

APR 2 1 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

In the Matter of)
)
 Amendment of the Commission's)
 Rules to Establish New)
 Personal Communications Services)

GEN Docket No. 90-314

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys and pursuant to Section 1.429(f) of the Commission's rules, hereby opposes the March 7, 1994 Petition for Reconsideration (the "Petition") of the Commission's *Third Report and Order* in the above-referenced proceeding,¹ filed by Advanced Cordless Technologies, Inc. ("ACT"). As we discuss below, each of ACT's requests -- for reconsideration of the Commission's decision to deny it a pioneer's preference and that the Commission rescind Omnipoint's final preference award -- should be denied.

INTRODUCTION AND SUMMARY

The ACT Petition is both untimely and improper.

ACT was an applicant for a pioneer's preference in the narrowband portion of this rulemaking. That preference request was tentatively denied by the Commission, then finally denied, and, just last month, ACT's petition for reconsideration of that denial was summarily

¹ In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, *Third Report and Order*, GEN Docket No. 90-314, 59 Fed. Reg. 9419 (February 28, 1994) (the "*Third Report and Order*").

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dismissed. To the extent that the instant Petition again seeks reconsideration of ACT's pioneer's preference request, it is hopelessly out of time.

To the extent that the Petition simply lashes out at the preference holders in the broadband proceeding, it is improperly filed. ACT has failed to provide any evidence of a single ex parte rules violation by Omnipoint. All of ACT's allegations in that regard are either legally irrelevant or factually inaccurate. Apparently, ACT hopes that the Commission will look past ACT's reckless disregard for the truth and provide the factual substantiation for its Petition through an investigation. In the meantime, ACT proposes that the Commission revoke Omnipoint's final preference award based only on ACT's unsupported allegations.

Fortunately, the Commission's reconsideration procedures do not work that way. The reconsideration process is not the proper place to report mere suspicions. ACT cannot simply file a petition containing a number of admittedly unsupported allegations and expect the Commission blithely to reverse its order and then launch an investigation to determine if the allegations were true. Rather, traditional due process requires ACT to provide convincing evidence that the agency's order should be reversed. This ACT has not done.

DISCUSSION

I. The ACT Petition Was Not Timely Filed And Should Be Dismissed.

A brief history of the ACT narrowband pioneer's preference request shows that the ACT Petition is untimely by several months. In July, 1992, the Commission tentatively denied ACT's preference request because "[w]hile CT-2 type services are candidates for the 900 MHz spectrum proposed in the Notice for narrowband PCS, such systems do not meet our threshold test for innovativeness."² That tentative decision was made final by the Commission on June 24, 1993.³ On November 22, 1993, ACT filed a petition for reconsideration of the *First Report and Order*.⁴ The Commission dismissed that petition, in an order released March 4, 1994, because it was filed

² Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd. 7794, 7806 (1992).

³ First Report and Order, 8 FCC Rcd. 7162, 7176 (1993) (the "First Report and Order").

⁴ See ACT Petition, Appendix A.

73 days late.⁵ On March 7, 1994, just three days later, ACT filed the instant Petition. This time, it is 178 days late and the Commission should treat it the same as the last time ACT filed it.

The Petition claims to request reconsideration of the *Third Report and Order*. But there is no decision as to the ACT preference request in that order because the Commission had already denied it in the *First Report and Order*. ACT asserts that the denial only "became clear" when the *Second Report and Order*, 8 FCC Rcd. 7700 (1993), was released. ACT Petition at 1. While ACT may well be confused on matters of Commission procedure, the language of the *First Report and Order*, at ¶82, is clear and unambiguous: "We *deny* ACT's pioneer's preference request. . . ." (Emphasis added.) ACT's claim that its preference request should have been treated as if filed in the broadband proceeding is untenable, since it is based on technology that is used in the 900 MHz band.

II. ACT Has Not Provided Any Evidence that Omnipoint Violated the Ex Parte Rules.

The Commission's rules require petitions for reconsideration to allege facts of legal relevance.⁶ The ACT Petition fails to offer any allegations that have not already been presented to the Commission and it fails to offer any facts to support its allegations. Despite this, ACT has recently defended its Petition as presenting three categories of "facts."⁷ But, upon review, each category turns out to be nothing more than strings of innuendo and irrelevant accusations.

One category of specific facts and circumstances on which we rely is the evidence of numerous instances of letters filed by the three recipients of preferences in question (APC, Cox and Omnipoint) which on their face demonstrate that the substance of the undisclosed oral communications could not have related to previously-filed written presentations that had been served on the other parties.

ACT Opposition at 5. In this first category, ACT attempts to ride the coat tails of Pacific Bell. In fact, ACT attached Pacific Bell's January 26, 1994 letter to the Commission (the "Pac Bell

⁵ *Memorandum Opinion and Order*, GEN Docket No. 90-314, FCC 94-30, at ¶ 56.

⁶ 47 C.F.R. §1.429(b)

⁷ See ACT's Opposition to Omnipoint's Motion to Strike, GEN Docket No. 90-314 (April 11, 1994) at 5-6 (the "ACT Opposition").

Letter") to the Petition. ACT adds no new factual allegations to the ones made in the Pac Bell Letter, which was filed nearly six weeks before the ACT Petition. As ACT recognizes, all three broadband pioneers have specifically responded to Pacific Bell's allegations. Omnipoint will not belabor the Commission by repeating its response here.⁸ At best, the Pac Bell Letter raises the possibility of a fact investigation to be conducted at the Commission's discretion. But, Omnipoint strongly believes that a review of the allegations made by Pacific Bell will show that no such investigation is warranted. ACT would have the Commission reverse its *Third Report and Order* even before it reviews the Pacific Bell allegations. Any such reconsideration based on unproven allegations clearly would be improper.

Another category of specific facts and circumstances on which we rely is the amazing number of ex parte contacts that were made by these three parties

ACT Opposition at 5. In this category, ACT relies on allegations that are both legally irrelevant and factually mistaken. Nowhere do the Commission's rules limit the number of ex parte contacts that interested parties may make. Thus, ACT does not and cannot cite to any violations of the Commission's rules. The sheer number of contacts is not sufficient evidence to support reconsideration because it is not legally relevant.

The allegation that Omnipoint made "hundreds" of contacts is just factually incorrect. ACT appears to have arbitrarily combined all of the contacts made by the three broadband preference holders and PCS Action, Inc.⁹ Of the 121 alleged contacts listed in Appendix D to the ACT Petition, only nineteen were attributed to Omnipoint. But, as our attached Appendix A demonstrates, of the nineteen, one never occurred at all, another five were not ex parte contacts, and two were ex parte contacts related to a separate preference request that was subsequently denied by the Commission. Thus, in reality, ACT's complaint against Omnipoint comes down to

⁸ See Letter from Omnipoint Communications, Inc. to Andrew S. Fishel, GEN Docket No. 90-314, ET Docket No. 93-266 (February 1, 1994).

⁹ Omnipoint has never encouraged PCS Action, Inc. or the other broadband preference holders to make ex parte contacts on its behalf and, to the best of its knowledge, none of them have ever made a presentation, ex parte or otherwise, on the merits of Omnipoint's entitlement to a pioneer's preference.

only eleven ex parte contacts over a two and one-half year period from January, 1992 to March, 1994. Even under its invented, "amazing number" standard, ACT has failed to show how Omnipoint violated the ex parte rules. According to ACT, "[i]n major proceedings, a tour of the Commissioner's offices on the eighth floor and perhaps other senior officials may be arranged. There may be a follow-up contact or two." ACT Petition at 21. How do Omnipoint's eleven visits violate this standard? The truth is, they do not. But, ACT's exaggeration and inept fact investigation do show a reckless disregard for the Commission's processes. The resulting inaccuracies improperly malign Omnipoint and have, unfortunately, found a permanent place in the Commission's records. For this reason alone, the Petition should be dismissed.¹⁰

Still another category of specific facts and circumstances on which we rely is the confluence of the subjects that were unrestricted and the restricted subject of these pioneer's preferences which could not intellectually or conceptually be separated

ACT Opposition at 5. In this category, ACT alleges that the issues in the broadband preference proceeding, which was restricted until February 28, 1993, were so "intertwined" with the other issues in GEN Docket No. 90-314 and ET Docket No. 93-266¹¹ that they "could not intellectually or conceptually be separated" The conclusion that ACT draws from this is that Omnipoint must have discussed the merits of its preference request during the restricted period. Of course, the premise is faulty and insults the intelligence of not only the preference holders, but the Commission as well.

The *NPRM* issues had nothing to do with the relative merits of the then-pending pioneer's preference requests and could easily be separated, both intellectually and conceptually. For example, one of the major issues raised in the *NPRM* was whether "pioneer's preference rules continue to be appropriate in an environment of competitive bidding."¹² This issue was not at all

¹⁰ One way the Commission may remedy the harm to Omnipoint is by granting its March 31, 1994 Motion to Strike the ACT Petition.

¹¹ In the Matter of Review of the Pioneer's Preference Rules, *Notice of Proposed Rulemaking*, ET Docket No. 93-266, 8 FCC Rcd. 7692 (1993) (the "*NPRM*").

¹² *Id.* at 7693.

"intertwined" with restricted issues, such as the merits of Omnipoint's preference request. Unlike ACT, the Commission recognized this distinction and, in its *NPRM*, explicitly stated that "[t]his is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted. . . ." ¹³ ACT's new "intertwining" test, which is not part of the Commission's rules, would have restricted PCS preference requesters from making any *ex parte* contacts concerning the issues in ET Docket No. 93-266.

Similarly, as to the issues in GEN Docket No. 90-314 that eventually led to the adoption of PCS service and allocation rules in the *Second Report and Order*, Omnipoint had as much right to make *ex parte* contacts in this non-restricted proceeding as any other interested party. There is no Commission rule prohibiting Omnipoint from discussing technical issues related to the non-restricted proceedings in GEN Docket No. 90-314 simply because it was also a pioneer's preference requester or a tentative preference holder.

More to the point, however, the ACT Petition does not address how Omnipoint violated even this concocted "intertwining" rule. ACT fails to cite a single example of which non-restricted issues were so intertwined with Omnipoint's preference. ACT offers no evidence that any such intertwined issues were actually raised during any *ex parte* contact. In sum, ACT creates a new "intertwining" rule not found in the Commission's rules and then offers no evidence to support its contention that Omnipoint could have or, in fact, did violate the rule. Its Petition cannot survive on that basis.

III. The Use of Reconsideration Procedures to Report Alleged Ex Parte Violations is Inappropriate.

ACT nicely summarizes in the last paragraph of its Petition the incredible flaw of its underlying approach to reconsideration. "[W]e ask that the final award of preferences to APC-Post, Cox and Omnipoint be rescinded and set aside and that the prima facie matter of their apparent violation of the ex parte rules be designated for hearing." ACT Petition at 28. Aside from the fact that ACT has not even provided *prima facie* evidence of any rule violation, its use

¹³ *Id.* at 7695.

of the reconsideration process to request an investigation is simply contrary to the Commission's rules regarding ex parte investigations. Under 47 C.F.R. §1.1212, reports to and investigations of alleged ex parte violations by the Managing Director of the Commission are made according to the specified Part 1 procedures, not in the context of a reconsideration proceeding. This was the procedure followed by Pacific Bell, ACT's apparent mentor. Aside from ACT, no party alleging ex parte violations in this proceeding has attempted to misuse the Commission's reconsideration procedures in this manner.

CONCLUSION

For the foregoing reasons, Omnipoint respectfully requests that the Commission dismiss or, in the alternative, deny the ACT Petition.

Respectfully submitted,

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Date: April 21, 1994

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APPENDIX A

A REVIEW OF OMNIPPOINT EX PARTE CONTACTS ALLEGED BY ACT

<u>DATE OF CONTACT</u>	<u>ISSUES DISCUSSED (BY DOCKET)</u>	<u>FCC STAFF CONTACTED</u>
3/2/92-- NO EX PARTE CONTACT ¹		
6/22/92-- IRRELEVANT EX PARTE CONTACT ²		
7/7/92-- IRRELEVANT EX PARTE CONTACT ²		
5/10/93	90-314, 92-100	Thomas Stanley
5/11/93	90-314, 92-100	Thomas Stanley, David Means Anthony Serafini, Philip Inglis, Nam Pham, Thomas Derenge
7/27/93	90-314, 92-9, 92-100	Robert Pepper, David Reed, John Williams
7/29/93	90-314, 92-9, 92-100	Thomas Stanley, Julius Knapp, Paul Marrangoni, Anthony Serafini, Nam Pham, Thomas Derenge
8/02/93	90-314, 92-9, 92-100	John Williams, Evan Kwerel
8/11/93-- NO EX PARTE CONTACT ³		

¹ Both Omnipoint's records and the records available in the Commission's public file of GEN Docket No. 90-314 indicate that Omnipoint made no ex parte contacts and filed no materials on this date.

² The ex parte contacts on this day occurred on behalf of Omnipoint Corporation, the parent of Omnipoint Communications Inc., concerning its preference request with Oracle Data Publishing, Inc., and McCaw Cellular Communications, Inc. This preference request, PP-59, was subsequently denied by the Commission. *Third Report and Order* at ¶227. Therefore, the ex parte contacts made that day have no relevance to Omnipoint's final preference award from its preference request in PP-58.

³ Omnipoint filed its "Opposition to Motion for Leave to File Supplemental Comments" in GEN Docket No. 90-314, responding to Qualcomm, Inc.'s "Supplemental Comments" filed on July 27, 1993. Section 1.45(a) of the Commission's rules permitted the timely filing of Omnipoint's opposition and Section 1.1202(b) generally exempts from the definition of "presentation" pleadings filed in a timely manner pursuant to the Commission's rules. Therefore, Omnipoint's August 11 opposition was not an ex parte presentation.

<u>DATE OF CONTACT</u>	<u>ISSUES DISCUSSED (BY DOCKET)</u>	<u>FCC STAFF CONTACTED</u>
8/17/93	90-314, 92-9, 92-100	Byron Marchant, Commissioner Andrew Barrett
8/24/93	90-314, 92-9, 92-100	David Means, Phillip Inglis
8/30/93	90-314, 92-9, 92-100	David Means, Phillip Inglis
9/14/93-- NO EX PARTE CONTACT ⁴		
9/15/93	90-314, 92-9, 92-100	Randall Coleman, Paul Marrangoni
9/16/93	90-314	Letter to William F. Caton, placed in the Commission's public file for GEN Docket No. 90-314
9/29/93-- NO EX PARTE CONTACT ⁵		
9/29/93-- NO EX PARTE CONTACT ⁶		
1/24/94	90-314	David Means, Phillip Inglis, Richard Engelman
2/23/94-- NO EX PARTE CONTACT ⁷		

⁴ Omnipoint filed a video tape supplementing its August, 1993 "Semi-Annual Experimental License Progress Report" in GEN Docket No. 90-314. Under the terms of its experimental license (call sign KK2XCV), Omnipoint is required to make such a filing. The video tape supplementing this required report is, therefore, outside the scope of the ex parte rules. See 47 C.F.R. §1.1202(a).

⁵ Omnipoint filed an "Opposition to Motion to Strike" in GEN Docket No. 90-314, in response to Qualcomm, Inc.'s September 15 Motion to Strike. Section 1.45(a) of the Commission's rules permitted the timely filing of Omnipoint's opposition and Section 1.1202(b) generally exempts from the definition of "presentation" pleadings filed in a timely manner pursuant to the Commission's rules. Therefore, Omnipoint's September 29 opposition was not an ex parte presentation.

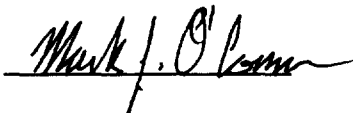
⁶ Omnipoint filed a letter to William F. Caton of the FCC in GEN Docket No. 90-314. As the Commission's public file shows, Omnipoint served all parties in GEN Docket No. 90-314 with a copy of this letter and so it is not an ex parte presentation. See 47 C.F.R. §1.1202(b)(1). Further, as ACT is aware, Omnipoint previously explained that this was not an ex parte contact in its February 1, 1994 response to the Pac Bell Letter.

⁷ Omnipoint filed a letter to Andrew S. Fishel of the FCC in GEN Docket No. 90-314, responding to the Qualcomm, Inc. letter of February 8, 1994. As the Commission's public file shows, Omnipoint served all parties in GEN Docket No. 90-314 with a copy of this letter and so it is not an ex parte presentation. See 47 C.F.R. §1.1202(b)(1).

CERTIFICATE OF SERVICE

I, Mark J. O'Connor, certify that on this day, April 21, 1994, a copy of the attached "OPPOSITION TO PETITION FOR RECONSIDERATION" was sent via first-class mail, postage pre-paid, to the following party:

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